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No. 88-557

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MICHIGAN, PETITIONER

v.

REGINALD D. LEIGH

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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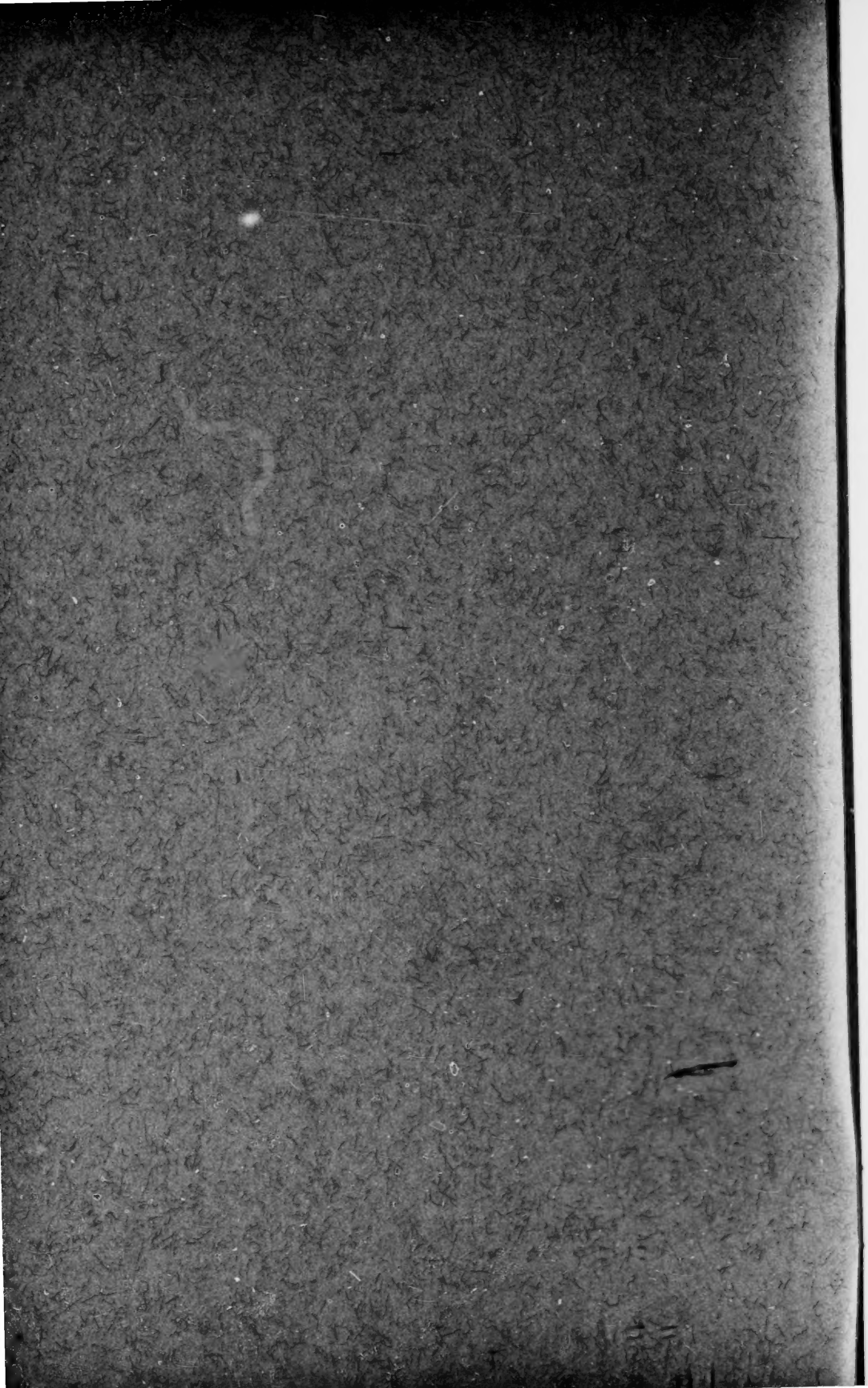

QUESTION PRESENTED

Whether the State's delay in filing a criminal complaint against respondent warranted dismissal of that complaint under the Due Process Clause.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. On May 8, 1986, Detroit police officers executed a search warrant at respondent's business, Reggie's Styles Unlimited, a hair salon in Detroit. In the back room of the salon, the officers found a jacket that contained 20 envelopes of cocaine and a piece of paper with respondent's name on it (Pet. App. 2a). The officers arrested respondent on the charge of possession of cocaine with intent to deliver it.[1] Respondent was released from custody several

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[1] Possession of cocaine with intent to deliver it is a felony under Michigan law. See Mich. Comp. Laws Ann. §§ 333.7104(2), 333.7214(a)(iv), 333.7401 (West 1980 & Supp. 1988).

days later, without having formal charges lodged against him.[2] On December 2, 1986, a magistrate issued a complaint and warrant formally charging respondent with the offense of possession with intent to deliver less than 50 grams of cocaine. *Ibid.*

Respondent was again arrested and arraigned before a magistrate on December 18, 1986, some 225 days after his initial arrest. Pet. App. 2a. On December 23, 1986, respondent appeared before the 36th District Court for the City of Detroit. After a brief hearing, the state court found that there was probable cause to charge respondent with the narcotics offense. Accordingly, the court bound him over for trial before the Recorder's Court for the City of Detroit. Dec. 23, 1986, Tr. 1-15; see Mich. Comp. Laws Ann. §§ 766.1, 766.4, and 766.13 (1982).[3]

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[2] Under Michigan law, an individual arrested on a felony charge without a warrant must be brought promptly before a magistrate for arraignment on a written complaint and warrant. See Mich. Comp. Laws Ann. §§ 764.13 and 764.26 (West 1982). Those documents, which initiate the formal charging process, must be authorized by the prosecuting attorney. See Mich. Comp. Laws Ann. § 764.1(1) (West 1982); see generally *People* v. *Mallory*, 421 Mich. 229, 365 N.W.2d 673 (1985).

[3] At that preliminary examination, respondent stipulated that the police officers found a total of 4.56 grams of cocaine in 20 separate small envelopes during the May 8 search. See Dec. 23, 1986, Tr. 5. The prosecution's only witness, Detroit Police Officer James Willis, testified that other persons were in the salon during the search. He was unable to describe the piece of paper retrieved from the jacket, other than recalling that respondent's name and the salon's address appeared on it. He did not know whose jacket it was and suggested that the police had not even taken the jacket. See *id.* at 6-9.

The court summarized its probable cause determination as follows (Dec. 23, 1986, Tr. 14):

> The testimony [of the police officer] is that the jacket was in close proximity to [respondent] and some proof of – some paper with [respondent's] name on it was in that jacket. That is not con-

2. In the Recorder's Court, respondent filed a pretrial motion to dismiss the complaint on the ground that the "unwarranted delay" of 225 days between his initial arrest and arraignment rendered him unable to prepare a defense and amounted to a violation of "due process of law" (Resp. Mot. To Dismiss For Denial Of Due Process 2 (Feb. 6, 1987), *People* v. *Leigh*, No. 87-00032 (Mich. Rec. Ct.)). Respondent alleged that the jacket containing the cocaine was not his and that other persons who were in the salon on May 8 would have been able to identify the jacket's owner. Respondent therefore contended that as a result of the long delay in filing the complaint his "memory had faded, witnesses had moved, and their whereabouts are unknown. People who were present at the time of the execution of the search warrant cannot be recalled" (*ibid.*). The state trial court held a hearing on respondent's motion.[4]

Sergeant Franscott Fowler, a member of the Narcotics Section of the Detroit Police Department and the officer in charge of the May 8, 1986, search of respondent's salon, was the only witness at the hearing. Fowler testified that sometime in May 1986, after the search and initial arrest, he asked the Wayne County Prosecuting Attorney's Office to lodge formal criminal charges against respondent. That Office would not do so until laboratory analyses of the cocaine were completed and certain clerical changes were made in the officers' reports. Those clerical changes, which amounted to nothing more than adding several evi-

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clusive by any means but it does I think cross the threshold of probable cause and the Court is finding based on the evidence which could be better than it is but for purposes of this examination is sufficient to find probable cause to charge [respondent] as he is charged.

[4] The prosecutor apparently did not file a written opposition to respondent's motion, as none appears in the record.

dence identification numbers to the reports, required only five minutes of Fowler's time. The laboratory analyses, however, which were requested on May 8 and 9, were not completed until August 30, 1986; a shortage of technicians caused that delay. In December 1986 Sergeant Fowler again requested the prosecutor to file charges against respondent. He had no explanation for why he waited until December to do so. Pet. App. 4a-5a; Br. in Opp. App. 7, 10-13, 14-16, 17-20.

At the close of the hearing, the prosecutor urged the court to deny respondent's motion, principally because "there has been no substantive evidence or even any testimony that there has been any prejudice" (Br. in Opp. App. 32).[5] In any event, the prosecutor argued that delaying the filing of the criminal complaint until December could not have prejudiced respondent since he knew in May that he could face narcotics charges. The prosecutor thus contended that respondent "had the opportunity at that time to gather up any names of any persons that were in his shop or any witnesses that he wanted to talk to. He had an opportunity to do all that and he didn't do it. He chose not to do it." *Ibid.*

3. The state trial court granted respondent's motion and dismissed the complaint (Br. in Opp. App. 32-36). The court followed *People* v. *Hernandez,* 15 Mich. App. 141, 146-147, 170 N.W.2d 851, 854 (1968), which called for weighing the prosecution's reasons for waiting to file criminal charges against the prejudice suffered by the defendant in determining whether that delay amounted to a denial of "procedural due process." The court found that

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[5] Sergeant Fowler confirmed that the police had not taken the jacket in which the cocaine was found (Br. in Opp. App. 22-23). He mentioned that "[p]roof of ownership from the jacket was taken," but did not describe that document or paper (*id.* at 23).

the shortage of laboratory technicians caused the delay in filing charges, and that the prosecution had not deliberately sought or caused the delay (Br. in Opp. App. 33-34). Indeed, the court stated that "the intentions of the police seem to be within reason, they are just working with a very difficult situation or were working with a very difficult situation at that time" (*id.* at 35-36). Nevertheless, the court found that the delay caused respondent "undue prejudice," principally because he "would have a tough time defending himself against [the] charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time" (*id.* at 35). Accordingly, the court concluded that such undue prejudice outweighed the prosecution's reasons for waiting to file charges and thus required the dismissal of the complaint (*id.* at 36).

4. The Michigan Court of Appeals affirmed (Pet. App. 1a-8a). It relied on *People* v. *Bisard,* 114 Mich. App. 784, 319 N.W.2d 670 (1982), which refined the *Hernandez* standard for determining whether the prosecution's delay in filing charges denied the defendant due process of law. According to the *Bisard* court, "once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted" (*id.* at 791, 319 N.W.2d at 673). In so holding, the court expressly rejected the State's contention that a defendant must show "actual and substantial prejudice and purposeful delay to gain tactical advantage" in order to establish a due process violation (Pet. App. 7a).

Observing that respondent's defense "was that the yellow jacket containing the cocaine was not his and was too small to fit him" (Pet. App. 3a), the court of appeals accepted the trial court's finding that the delay had prejudiced respondent because he "had forgotten the names of

everyone present on May 8 and had been unable to locate some of those persons whose presence he did recall and who might know to whom the jacket belonged" (*id.* at 4a). The court of appeals also upheld the trial court's finding that the reason for the delay, the shortage of laboratory technicians, was not sufficient to justify the delay. In any event, it noted that the prosecution's explanation "completely failed to account for 94 days of delay" (*id.* at 8a). Accordingly, the court agreed with the trial court that "on balance, the prejudice to [respondent] outweighed the reasons provided by the state for the delay" (*ibid.*).

5. On September 13, 1988, the Michigan Supreme Court, with two justices dissenting, denied the State's application for leave to appeal (Pet. App. 9a-10a).

DISCUSSION

Following this Court's decision in *United States* v. *Lovasco*, 431 U.S. 783 (1977), federal and state courts have divided over the proper standard for determining if the prosecutor's delay in filing criminal charges amounts to a violation of the Due Process Clause. In particular, the lower courts have disagreed about whether a defendant, in addition to showing actual prejudice, must establish that the prosecutor delayed filing charges in order to gain a tactical advantage over the defendant or to advance some other impermissible purpose. We thus agree with petitioner (Pet. 15-18) that this conflict over an important question of constitutional law merits the Court's attention.

Nevertheless, this case may not be an appropriate vehicle for addressing that issue. The Michigan state courts did not explicitly resolve the case on the basis of federal constitutional grounds. Moreover, the record suggests that the "prejudice" to respondent found by the state courts was not the kind of prejudice that is required to satisfy the first

part of the due process inquiry under federal standards. It may therefore not be necessary for the Court in this case even to reach the significant issue that has divided the lower courts. Finally, this Court's recent decision on a closely related due process issue, *Arizona* v. *Youngblood,* 109 S. Ct. 333 (1988), may well have the effect of settling the dispute among the lower courts as to the proper standard to use in determining whether a prosecutor's delay can justify dismissal even in the absence of bad faith by law enforcement authorities. We therefore recommend that this case be remanded to the Michigan courts for further consideration in light of this Court's decision in *Arizona* v. *Youngblood.*

1. This Court explained in *United States* v. *Lovasco,* 431 U.S. 783, 789 (1977), that the principal protection against preindictment delay is the applicable statute of limitations. Nonetheless, the Court held, the Due Process Clause has a role, albeit a limited one, "in protecting against oppressive delay" in the filing of criminal charges. That limited constitutional protection, the Court held (*id.* at 789-790), is available only when the defendant's claim satisfies a two-part test. The defendant must actually have been prejudiced by the delay, and the government's reasons for the delay must be such as to make compelling the defendant to stand trial a violation of those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency" (*id.* at 790 (citations and internal quotation marks omitted)). The Court then held that, while the second part of that test could be satisfied where the government sought " 'to gain tactical advantage over the accused' " (*id.* at 795 (quoting *United States* v. *Marion,* 404 U.S. 307, 324 (1971)), it is not satisfied by investigative delay – *i.e.,* fundamental conceptions of justice are not offended when the delay is due to

the government's continued criminal investigation (431 U.S. at 791-796). Such "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused' " (*id.* at 795 (citation omitted)).

State and federal courts have adopted roughly two approaches in applying the *Lovasco* standard. Most courts have stated that relief is available only if the defendant is prejudiced and the government intended to delay the initiation of proceedings in order to obtain a tactical advantage over the defendant. *E.g., United States* v. *Ismaili,* 828 F.2d 153, 166 (3d Cir. 1987), cert. denied, 108 S.Ct. 1110 (1988); *United States* v. *Hoo,* 825 F.2d 667, 671 (2d Cir. 1987), cert. denied, 108 S. Ct. 742 (1988); *United States* v. *Lebron-Gonzalez,* 816 F.2d 823 (1st Cir.), certs. denied, 108 S. Ct. 135, 166 (1987); *United States* v. *Caporale,* 806 F.2d 1487, 1514 (11th Cir. 1986), certs. denied, 107 S. Ct. 3195, 3265 (1987); *United States* v. *Jenkins,* 701 F.2d 850, 854 (10th Cir. 1983); *United States* v. *Atisha,* 804 F.2d 920, 928 (6th Cir. 1986), cert. denied, 479 U.S. 1067 (1987); *State* v. *Hall,* 395 N.W.2d 640, 642 (Iowa 1986); *State* v. *Nelson,* 719 S.W.2d 13, 20 (Mo. App. 1986); *State* v. *Baker,* 614 S.W.2d 352, 354 (Tenn. 1981). That reading of *Lovasco* is in accord with this Court's description of the standard for Fifth Amendment relief from preindictment delay in *United States* v. *Gouveia,* 467 U.S. 180, 192 (1984).[6] See also *Arizona* v. *Youngblood,* 109 S. Ct. 333, 337 (1988); *id.* at 341 n.5 (Blackmun, J., dissenting).

[6] The *Gouveia* Court stated (467 U.S. at 192 (footnote omitted)) that, beyond the protection from preindictment delay furnished by the applicable statute of limitations, "the Fifth Amendment requires dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. *United States* v. *Lovasco, supra,* at 789-790; *United States* v. *Marion, supra,* at 324."

On the other hand, a minority of federal and state courts have articulated various versions of more relaxed approaches to applying *Lovasco*. Those courts have not required an intentional seeking of tactical advantage or recklessness on the part of the prosecution, but have suggested or held that less reprehensible governmental reasons for delay, assessed in light of the prejudice caused by the delay, can be sufficient to establish a violation of the Due Process Clause. See, *e.g.*, *United States* v. *Moran*, 759 F.2d 777, 782-783 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986); *People* v. *Lawson*, 67 Ill. 2d 449, 460-461, 367 N.E.2d 1244, 1249 (1977); *People* v. *Nuss*, 405 Mich. 437, 452-456, 276 N.W.2d 448, 454-456 (1979); *State* v. *Luck*, 15 Ohio St. 3d 150, 157, 472 N.E.2d 1097, 1105 (1984); *State* v. *Anderson*, 46 Wash. App. 565, 567, 731 P.2d 519, 521 (1986).[7]

2. While state and federal courts are divided on the issue the State presents in this case, this case may not be a proper vehicle for this Court to grant plenary review to address that issue, for several reasons.

a. This case presents a threshold question whether the decision below rests on an adequate and independent state

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[7] The Fifth, Seventh, and Eighth Circuits have been inconsistent in their approaches. Some decisions have required intentional seeking of tactical advantage or similar advantage-seeking conduct or impermissible reasons. *E.g.*, *United States* v. *Scott*, 795 F.2d 1245, 1249-1250 (5th Cir. 1986); *United States* v. *Watkins*, 709 F.2d 475, 479 (7th Cir. 1983); *United States* v. *Bartlett*, 794 F.2d 1285, 1293 (8th Cir. 1985), cert. denied, 479 U.S. 934 (1986). Other decisions have articulated more flexible approaches. *E.g.*, *United States* v. *Townley*, 665 F.2d 579, 581-582 (5th Cir.), cert. denied, 456 U.S. 1010 (1982); *United States* v. *Taylor*, 603 F.2d 732, 735 (8th Cir.), cert. denied, 444 U.S. 982 (1979). See *Dickerson* v. *Louisiana*, 816 F.2d 220, 229 n.16 (5th Cir.), cert. denied, 108 S.Ct. 352 (1987); *United States* v. *Hollins*, 811 F.2d 384, 387-388 (7th Cir. 1987), cert. denied, 108 S.Ct. 742 (1988).

ground. In his motion to dismiss the complaint, respondent did not expressly invoke any federal right.[8] He simply contended that the prosecutor's delay "denied [him] due process of law," citing two Michigan state court decisions and making a passing reference to an Illinois state court decision, only the latter of which explicitly based its holding on the Due Process Clause of the Fourteenth Amendment (Resp. Mot. To Dismiss For Denial Of Due Process 2, 3 (Feb. 6, 1987), *People* v. *Leigh*, No. 87-00032 (Mich. Rec. Ct.)).[9]

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[8] Before the Michigan Court of Appeals, respondent specifically invoked both the Due Process Clause of the Fourteenth Amendment and its counterpart in the Michigan State Constitution in urging that court to uphold the trial court's dismissal of the complaint (Resp. Reply Br. 9, *People* v. *Leigh*, No. 99662 (Mich. Ct. App.)).

[9] Respondent cited *People* v. *Hernandez*, 15 Mich. App. 141, 170 N.W.2d 851 (1968), and *People* v. *Bisard*, 114 Mich. App. 784, 319 N.W.2d 670 (1982), and made a passing reference to *People* v. *Lawson*, 67 Ill.2d 449, 367 N.E.2d 1244 (1977).

In *Hernandez*, the Michigan Court of Appeals set a standard for determining whether the prosecution's delay in filing charges amounts to a violation of "procedural due process," but did not mention either the federal or state constitution (15 Mich. App. at 147, 170 N.W.2d at 854). The court did, however, rely on *Ross* v. *United States*, 349 F.2d 210 (D.C. Cir. 1965) (per curiam), which held that the government's delay in charging the defendant violated the Due Process Clause of the Fifth Amendment. In *Bisard*, the Michigan Court of Appeals, again without referring to either the federal or state constitution, refined the *Hernandez* standard "in light of subsequent interpretations of due process law by the United States Supreme Court [in *Marion* and *Lovasco*]" (114 Mich. App. at 788, 319 N.W.2d at 672). Citing both federal and other state court decisions, including the Illinois Supreme Court's decision in *Lawson*, the *Bisard* court rejected a standard that would require a defendant "to prove both actual prejudice and unexplainable delay" (*id.* at 789, 319 N.W.2d at 673). Instead, the court read *Lovasco* as endorsing the following test to determine whether a defendant has been denied "his right to due process of law": "once a defendant has shown some prejudice, the prosecution bears the

The Michigan state courts did not explicitly resolve this case on the basis of federal or state constitutional grounds. Instead, the state trial court, citing only *People* v. *Hernandez, supra* (see note 9, *supra*), framed the issue as whether respondent's "Constitutional Rights * * * have been violated" (Br. in Opp. App. 33). And the appellate court, citing only Michigan state court decisions,[10] similarly considered whether the "delay in instituting prosecution denies [respondent] due process" (Pet. App. 3a).

In general, the Michigan state courts do not appear to treat the claim of prejudicial delay in filing criminal charges solely as a matter of state constitutional law. See note 9, *supra*. Indeed, the Michigan Supreme Court has resolved that issue based on an intertwining of federal and state constitutional law. See *People* v. *Nuss*, 405 Mich. 437, 452-453 & n.9, 276 N.W.2d 448, 454 & n.9 (1979).

In *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983), this Court made clear that when a state court decision "fairly appears * * * to be interwoven with the federal law,

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burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted" (114 Mich. App. at 791, 319 N.W.2d at 673).

In *Lawson*, the Illinois Supreme Court expressly considered challenges to the prosecution's delay in filing charges as arising under the Due Process Clause of the Fourteenth Amendment (67 Ill. 2d at 456, 367 N.E.2d at 1247). The court also treated *Lovasco* as approving a standard that involved "balancing the actual and substantial prejudice to the defendant with the reasonableness of or reasons for the delay" (67 Ill. 2d at 461, 367 N.E.2d at 1249).

[10] Apart from relying on *Bisard* (see note 9, *supra*), the court cited *People* v. *Shelson*, 150 Mich. App. 718, 389 N.W.2d 159 (1986), *People* v. *Dungey*, 147 Mich. App. 83, 383 N.W.2d 128 (1985), and *People* v. *Vargo*, 139 Mich. App. 573, 362 N.W.2d 840 (1984). *Shelson*, *Dungey*, and *Vargo* simply recite and apply the standard set forth in *Bisard* without referring either to the federal or state constitution.

and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." See also *Harris* v. *Reed,* No. 87-5677 (Feb. 22, 1989), slip op. 4-5. Here, a close look at the relevant Michigan state court decisions shows that those cases relied on federal constitutional rulings and were thus "interwoven with federal law." See note 9, *supra.* Thus, while the matter is not entirely free from doubt, it appears that the decision below does not rely on the Michigan constitution alone. Under the *Michigan* v. *Long* presumption, this Court's jurisdiction is therefore not barred by the existence of an adequate and independent state ground.

b. A second problem with this case that may render it unsuitable as a vehicle to resolve the issue on which the lower courts are divided concerns the finding of prejudice by the Michigan courts. Those courts based their finding of prejudice in this case on factors that would not have been legally sufficient to constitute prejudice under the prevailing standards. Accordingly, the first part of the two-part due process test—the showing of prejudice—may not have been satisfied in this case, making it unnecessary for the Court to reach the question whether the second part of the test requires a showing of bad faith on the part of the prosecution.

The Michigan courts concluded that the 225-day delay between respondent's initial arrest and his arraignment on formal charges prejudiced his defense in two respects: respondent would be unable to remember or locate eyewitnesses who might identify the owner of the jacket containing the seized cocaine, and respondent could not retrieve the jacket which the police had never seized in order to show it could not have belonged to him. See Pet. App.

3a-4a; Br. in Opp. App. 35-36. The problem with that claim of prejudice is that it does not relate to any period of unreasonable delay that there may have been in bringing the charges in this case. First, respondent knew from the day of his initial arrest that he might face narcotics charges. Yet he proffered no explanation for his decision, at that time, not to take note of the customers in his salon. And respondent proffered no reason for connecting his apparent inability to locate those customers he could remember with the seventh-month delay in filing charges. Courts have routinely rejected such speculative and conclusory assertions of prejudice in determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause. See, *e.g.*, *United States* v. *Wallace*, 848 F.2d 1464, 1470 (9th Cir. 1988); *United States* v. *Ismaili*, 828 F.2d at 168-169; *United States* v. *Brock*, 782 F.2d 1442, 1444 (7th Cir. 1986); *United States* v. *Jenkins*, 701 F.2d at 855.

Second, respondent's claim of prejudice stemming from his inability to locate the jacket is not compelling, because respondent has failed to show that he might have been able to locate the jacket if charges had been brought after what the court would have considered a reasonable delay. Thus, there was no showing that the unavailability of the jacket resulted from the delay in filing the criminal charges. See *United States* v. *Mills*, 641 F.2d 785, 789 (9th Cir.) (finding that even if the government had indicted defendants one month after the crime, the physical evidence could have been unavailable), cert. denied, 454 U.S. 902 (1981). Because respondent has not shown the requisite prejudice, this Court would not need to reach the significant issue that has divided the lower courts, *i.e.*, whether the defendant must also show that the prosecutor delayed filing charges in order to gain a tactical advantage over the defendant.

c. A third factor weighing against plenary review in this case is this Court's recent decision in *Arizona* v. *Youngblood,* 109 S. Ct. 333 (1988), which may make it unnecessary for this Court ever to address the issue presented here. In *Youngblood,* the Court held that the failure by the prosecution to preserve potentially useful evidence does not result in a due process violation unless the defendant can show bad faith on the part of the police. *Id.* at 337. If, as the Court held in *Youngblood,* the intentional or negligent destruction of potentially useful evidence does not violate due process unless it is done in bad faith, there is no justification for a different rule when a delay in bringing charges is held to be prejudicial because it has exactly the same result—the loss of potentially useful evidence. That was the basis on which the Michigan courts dismissed the complaint in this case, an action that was taken before this Court's decision in *Youngblood.* Accordingly, it would appear quite likely that if the Michigan courts have occasion to reconsider their ruling in light of *Youngblood,* the result in this case will be different, at least to the extent that the Michigan courts were relying on federal law as the basis for their ruling.

In addition to the conflict in analysis between *Youngblood* and the decision below, the *Youngblood* case contains language that specifically addresses the issue of preindictment delay and strongly supports the majority view that bad faith on the part of the prosecution is an essential element of the due process test. Citing *Marion* and *Lovasco,* the *Youngblood* Court noted that in related areas the Court has "stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government." 109 S. Ct. at 337. The Court noted that the good or bad faith of the State is irrelevant "when the State fails to disclose to the defendant

material exculpatory evidence." *Ibid.* But where the prejudice to the defense consists of the failure to preserve evidence that *might have* exonerated the defendant, as in this case, the Court held that due process is not denied in the absence of proof of bad faith. *Ibid.* The Court's characterization of the *Marion-Lovasco* line of cases, a characterization not disputed by the dissenting Justices, see *id.* at 341 n.5 (Blackmun, J., dissenting), would likewise appear to resolve the issue presented in this case.

Because of the problems presented by the record in this case, and because the issue both in this case and in others raising the same question may well be resolved by this Court's analysis in *Arizona* v. *Youngblood, supra,* we do not believe that plenary review is appropriate in this case at this juncture. Rather, we recommend that the case be remanded to the state courts for further consideration in light of this Court's recent decision in *Arizona* v. *Youngblood.*

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case to the Michigan Court of Appeals for further consideration in light of this Court's decision in *Arizona* v. *Youngblood,* 109 S. Ct. 333 (1988).

Respectfully submitted.

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